SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-809

UNITED STATES OF AMERICA,
Respondent,

v.

LOUIS GUSTAV LEFAIVRE,
LOUIS GUSTAV LEFAIVRE, JR.,
SHEILA ELIZABETH ECKERT,
NORMA LEIGH MILLER,
Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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January 17, 1975

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No. _____

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LOUIS GUSTAV LEFAIVRE,
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NORMA LEIGH MILLER,
Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioners Louis Gustav LeFaivre, Louis Gustav LeFaivre, Jr., Sheila Elizabeth Eckert, and Norma Leigh Miller respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on December 4, 1974.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on December 4, 1974. A timely petition for rehearing *en banc* was denied by order of the Court of Appeals for the Fourth Circuit dated December 23, 1974. This petition for writ of certiorari was filed within 30 days of that date in accordance with Rule 22 of the Supreme Court Rules. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the use of interstate facilities must play more than a minimal or merely incidental role in the activities of a concededly local gambling operation to invoke federal jurisdiction under 18 U.S.C. §1952?

2. Whether the petitioners were entitled to have the jury consider, through appropriate instructions, if the use of interstate facilities was sufficient to invoke federal jurisdiction under 18 U.S.C. §1952?

3. Whether proof of knowledge of the use of interstate facilities is required in order to convict petitioners of conspiracy to violate 18 U.S.C. §1952?

STATUTORY PROVISIONS INVOLVED

United States Code, Title 18:

§371. Conspiracy to Commit Offense or to Defraud United States

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

§1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to:

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2) and (3) shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they re-committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States . . .

STATEMENT OF THE CASE

Procedural Background

This case arose as a prosecution for violation of 18 U.S.C. §§1952 and 2 (use of a facility of interstate commerce with intent to promote, manage or carry on a gambling business illegal under the laws of the State of Maryland) and of 18 U.S.C. §371 (conspiracy to violate 18 U.S.C. §1952). A jury trial was held from September 17 through 25, 1973 with Chief Judge Northrup presiding (App. 5).[1] On September 25, 1973, the jury returned a verdict of Guilty as to each petitioner with respect to each of Counts 1 through 12, inclusive, of the Indictment. (App. 6). On January 10, 1973, the judgment of the Court was entered as to Louis G. LeFaivre, Jr. (App. 7), Norma Leigh Miller (App. 7) and Elizabeth Sheila Eckert (App. 8). On January 17, 1974, the judgment of the Court was entered as to Louis G. LeFaivre, pursuant to 18 U.S.C. §4208(b), committing him to the custody of the Attorney General for Study and Report (App. 8).

A timely Notice of Appeal was filed on behalf of each petitioner on January 18, 1974. The appeal was briefed and argued before the Court of Appeals for the Fourth Circuit and, in an opinion dated December 4, 1974, the Court affirmed each of the petitioners' convictions on Counts 1-12. On December 18, 1974, a Petition for Rehearing *En Banc* was filed and an order denying the request for rehearing was entered on December 23, 1974.

Substantive Evidence

The evidence at trial indicated that the petitioners were engaged in the operation of a local gambling ("Number") enterprise. Louis G. LeFaivre was in-

[1] References are to the Appendix filed in the Court below.

dicted as a backer, one who backed the writers by providing funds for paying off winning bets. Louis G. LeFaivre, Jr. (son of Louis G. LeFaivre) was identified as a person who, from time to time in the absence of Louis G. LeFaivre, settled accounts with writers. Elizabeth Sheila Eckert and Norma Leigh Miller were only identified as "telephone girls" or clerks, i.e., as persons who received bets from writers over the telephone, wrote down the bets and passed the information on (Tr. 704-705).[2] The Government's expert witness testified that a "phone lady" in a numbers operation such as the LeFaivre operation would have nothing to do with checks or money or the passage of checks or money (Tr. 705-707).

Except with respect to certain negotiable instruments outlined below, the evidence indicated that the LeFaivre gambling operation was entirely local in nature. Both the writers of the gambling operation and the bettors were local people in Baltimore. The operation was conducted only in Maryland and primarily in Baltimore, Maryland. *See* transcript generally.

Negotiable instruments related to the gambling operation since the writers cashed paychecks for bettors and used the checks in settling accounts with the backers. However, these negotiable instruments were, except for fourteen instruments described below, intrastate checks drawn on local banks. Hence, the only basis for finding a federal offense under 18 U.S.C. §1952 was the movement of these fourteen instruments drawn on out of state banks through interstate banking channels for collection. The instruments were cashed by Mr. LeFaivre, Sr. at a branch of the First National Bank in Baltimore and cleared through the Federal Reserve System to the banks upon which they were

[2] References are to the transcript filed in the Court below.

drawn. There was no evidence that any of the instruments were ever returned for any reason.

Of the fourteen "interstate" negotiable instruments introduced into evidence at trial, nine of the instruments were checks drawn on banks located outside the State of Maryland (Gov't Exhibits 1-4, 13, 14, 17, 19, 20). Four of the instruments were U.S. Treasury checks (Gov't Exhibits 11, 12, 15, 16) and one was a telegraphic money order drawn on Chase Manhattan Bank (Gov't Exhibit 18). Testimony at trial from Government witnesses who had been writers for Louis G. LeFaivre showed that twelve of the instruments had been received by them in transactions in no way relating to gambling. The evidence was as follows:

(1) Exhibits 1-4 were received by Edward Folderauer, a numbers writer, as strike benefits (Tr. 170-176).

(2) Exhibits 11 and 20 were received by Walter Fahrman, a numbers writer, from his brother and not in the course of gambling (Tr. 423,432).

(3) Exhibit 12 was a Treasury check payable to Jack Lederer, a numbers writer, and was a service disability check (Tr. 442-444).

(4) Exhibit 14 was a U.S. Life Insurance check payable to John Reed, a numbers writer. It was his own check and was not received in connection with a bet (Tr. 527).

(5) Exhibits 15 and 16 were Treasury checks cashed by Hester Fisher, a number writer, as favors to friends. Neither check was for a bet (Trs. 496-497).

(6) Exhibit 18 was a telegraphic money order cashed by Haywood Nelson, a numbers writer for an out-of-town friend. It had nothing to do with gambling activities (Tr. 624).

(7) Exhibit 19 was a payroll check cashed by George Humphrey for his son and was not for gambling (Tr. 605).

Of the two remaining instruments, only one was positively identified as having been accepted as a gambling payment; the purpose for which the other instrument was cashed could not be identified:

(1) Exhibit 17 was a paycheck for $50.17 cashed by Norman Harris, a numbers writer, for a bettor named Gilroy (Tr. 554). Harris cashed the check, took out the amount of the bet and gave Gilroy the balance (Tr. 554).

(2) John Pegram, the numbers writer who cashed Exhibit 13, could not remember whether he had cashed it for a bet or as a favor for a friend (Tr. 475). He testified that he frequently cashed checks for his fellow workers including those that did not gamble (Tr. 474).

Motions for judgment of acquittal were made at the end of the government's case (Tr. 728-735) and at the end of the defendants' case (Tr. 765). The motions were denied.

The Charge to the Jury

In instructing the jury, the Court refused to give any instruction requested by the petitioners on the degree of use of interstate commerce facilities necessary to invoke federal jurisdiction under 18 U.S.C. §1952, and the knowledge required to be proven with respect to the use of interstate facilities before conviction for conspiracy to violate 18 U.S.C. §1952 is authorized (App. 40-48). Petitioners duly excepted to the charge as given by the Court (App. 127-128).

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS ON THE SCOPE OF 18 U.S.C. §1952.

Section 1952 of Title 18 provides that a person who uses a facility in interstate commerce with intent to promote, manage or carry on an illegal activity and who thereafter continues to engage in or attempts to engage in the illegal activity may be fined or imprisoned as specified therein.

In *United States v. Salsbury*, 430 F.2d 1045 (4th Cir. 1970), the Fourth Circuit held that federal jurisdiction under §1952 could be invoked by the cashing of checks drawn on out of state banks by persons engaged in an illegal gambling operation and the movement of checks in interstate commerce for clearing purposes. *See also, United States v. Wechsler*, 392 F.2d 344 (4th Cir. 1968), *cert. denied*, 392 U.S. 932, *reh. denied*, 393 U.S. 902 (1968). The cashing of checks drawn on out-of-state banks constituted a use of facilities in interstate commerce within the meaning of §1952 regardless of the fact that the use was minimal and tangential to the gambling operation. *Salsbury, supra* at 1048.

In light of this Court's decision in *Rewis v. United States*, 401 U.S. 808 (1971), the Fourth Circuit was asked in this case to reconsider its position that the mere cashing of a small number of checks drawn on out-of-state banks, no matter how inconsequential, was sufficient use of interstate facilities to invoke federal jurisdiction under §1952. The Fourth Circuit again determined that any use of interstate facilities was sufficient despite evidence at trial, which the Court acknowledged, that the *LeFaivre* gambling operation

was a local operation involving minimal cashing of out-of-state checks. *See* pp. 3a and 8a of Appendix hereto.

Several other circuits have considered the same question and have resolved it against the assertion of federal jurisdiction under 18 U.S.C. §1952 in cases where the use of interstate facilities played a minimal and insubstantial part in the conduct of the illegal activity. *United States v. Altobella,* 442 F.2d 310 (7th Cir. 1971); *United States v. McCormick,* 442 F.2d 316 (7th Cir. 1971); *United States v. Isaacs,* 493 F.2d 1124 (7th Cir. 1971), *cert. denied,* 42 U.S.L.W. 3692 (U.S. June 17, 1974); *United States v. Archer,* 486 F.2d 670 (2d Cir. 1973); *reh. denied* 486 F.2d 683; *United States v. Vitich,* 357 F. Supp. 102 (W.D. Wis. 1973). The Fourth Circuit attempted to distinguish the *Altobella, McCormick* and *Archer* decisions but acknowledged that, if the decisions could not be confined to their facts, it declined to follow them and rejected any narrowly restrictive reading of §1952. *See* pp. 8a-10a of the Appendix hereto.

Petitioners submit that the above cited cases raise a significant point of conflict between the various circuits in determining the proper scope of §1952. In *United States v. Isaacs,* 493 F.2d 1124 (7th Cir. 1974), *cert. denied* 42 U.S.L.W. 3692 (U.S. June 17, 1974), a case which the Fourth Circuit did not attempt to distinguish factually, the Seventh Circuit reversed the convictions of the participants in a bribery scheme under §1952[3] and, in so doing, took issue directly with the Fourth Circuit's position as explicated in *Wechsler, supra* and *Salsbury, supra.* The Court there stated that it could not

[3] The jurisdictional element in *Isaacs* consisted of the cashing in Illinois of three checks drawn on banks located in Missouri which had cleared through the Federal Reserve Bank in St. Louis, Missouri. 493 F.2d at 1146.

agree with the Fourth Circuit "that the incidental use of a federally regulated banking facility furnishes the jurisdictional element of a §1952 offense". 493 F.2d at 1149. The test for invoking the jurisdiction of §1952 was rather "the nature and degree of interstate activity in furtherance of the state crime". *Id.* at 1148.

Similarly, in *United States v. McCormick*, 442 F.2d 316 (7th Cir. 1971), the Court refused to affirm a conviction under §1952 where the use of interstate facilities was the placing of an advertisement for lottery salesmen by the operator of a local Indiana lottery in a newspaper with an out of state mailed circulation of 200 to 500 people. Citing *Rewis, supra* and *Altobella, supra*, the Court characterized the role played by the interstate mailings as "a matter of happenstance" and "minimal and incidental" to the operation of the illegal lottery. 442 F.2d at 318.

The Fourth Circuit's attempt to distinguish *McCormick* must not be permitted to obscure the Seventh Circuit's continuous refusal to apply §1952 in an expansive manner. In both *McCormick* and the present case, the government has sought to convert the act of a person engaged in activity illegal under state law into a federal crime. The fact that there was no evidence to suggest that the defendant in *McCormick* actually employed any out-of-state salesmen as a result of the newspaper ad is, it is suggested, a distinction without substance. For, just as the defendant's act in *McCormick* of placing an advertisement in a newspaper with out-of-state circulation was insufficient to convert his activities into a federal crime so too the petitioners' actions in cashing or depositing a small number of checks drawn on out of state banks would be equally insufficient to create a §1952 crime in the Seventh Circuit. The decision in *Isaacs, supra* to reverse §1952 convictions based on the

payment of three checks drawn on out of state banks paid in furtherance of a bribery scheme clearly suggests that the Seventh Circuit's position, if applied to the facts of the present case, would require reversal of petitioners' convictions.

Finally, the decision of the Court below conflicts with the decision of the Fifth Circuit in *United States v. Presley*, 478 F.2d 163 (5th Cir. 1973) on the secondary point of whether the petitioners were entitled to have the jury consider, through appropriate instructions, if the use of interstate facilities was sufficient to invoke federal jurisdiction under 18 U.S.C. §1952. In its opinion, the Fourth Circuit relied on its discussion of §1952 generally to dispose of the jury instruction issue but added that, to the extent *Presley* suggests that the degree of use of interstate facilities is a question for the jury, the decision is erroneous. *See* pp. 15a-16a of the Appendix hereto.

These conflicts justify the grant of certiorari to review the judgment below.

II.

THE DECISION BELOW ALSO CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS ON THE NECESSITY OF PROVING KNOWLEDGE OF FACTS GIVING RISE TO FEDERAL JURISDICTION IN A PROSECUTION FOR CONSPIRACY TO COMMIT A FEDERAL CRIME AND THIS COURT HAS ALREADY GRANTED CERTIORARI IN A CASE THAT RAISES THE SAME ISSUE.[4]

The Fourth Circuit upheld the District Court's charge to the jury that, with respect to both the conspiracy count and the substantive §1952 counts, a guilty ver-

[4] *United States v. Alsondo*, 486 F.2d 1339 (2d Cir. 1973), *cert. granted sub nom. United States v. Feola*, 416 U.S. 935 (1974).

dict required neither a finding that the petitioners intended to use facilities in interstate commerce nor a finding that they knew of such use. *See* p. 16a of the Appendix hereto. In so doing, it expressly refused to follow the decisions of the Sixth Circuit in *United States v. Barnes*, 383 F.2d 287 (6th Cir. 1967), *cert. denied*, 389 U.S. 1040 (1968) and of the Second Circuit in *United States v. Alsondo*, 486 F.2d 1339 (2d Cir. 1973), *cert. granted sub nom. United States v. Feola*, 416 U.S. 935 (1974)[5] in which the Courts held that proof of knowledge of the facts conferring federal jurisdiction was required to convict for conspiracy to violate a federal crime. *See also, Nassif v. United States*, 370 F.2d 147 (8th Cir. 1966). The Fourth Circuit chose, instead, to follow the Ninth Circuit's decision in *United States v. Roselli*, 432 F.2d 879 (9th Cir. 1970), *cert. denied*, 401 U.S. 924 (1971)[6] that, for proof of conspiracy to violate §1952, it was sufficient "that the agreement contemplates the commission of a crime and that the crime contemplated is in fact and law a federal offense." 432 F.2d at 892.

In *United States v. Alsondo, supra*, the conspiracy charged was conspiracy to violate 18 U.S.C. §111 which prohibited assaults on federal officers engaged in the performance of official duties. While the Second Circuit suggested that it might be possible to distinguish a case involving assault on a federal officer from cases such as *United States v. Crimmins*, 123 F.2d 271 (2d Cir. 1971) involving federal crimes requiring use of or movement in interstate commerce, it rejected the distinction stating that it did not believe "the thrust of existing precedent can be so easily disregarded." 486 F.2d at

[5] See p. 20a of the Appendix hereto.

[6] *Id.*

1344. The federal crime involved in the present case, however, is one that clearly requires use of facilities in interstate commerce and, under the rationale of *Alsondo*, any conspiracy to commit it would necessitate proof of specific knowledge of the use of interstate facilities. The *Alsondo* case is presently before this Court on a writ of certiorari and is in direct conflict with the decision of the Fourth Circuit in this case.

These conflicts further justify the grant of certiorari to review the judgment below.

III.

THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING QUESTIONS CONCERNING THE APPROPRIATE ROLE OF THE JUDICIARY IN DETERMINING THE PROPER SCOPE OF FEDERAL CRIMINAL LAW ENFORCEMENT.

In discussing the scope of federal jurisdiction created by 18 U.S.C. §1952, at least one writer has suggested that the logical limit of the use of traditional jurisdictional bases as travel, transportation and communication in commerce has almost been reached by §1952.1 *Working Papers of the National Commission on Reform of Federal Criminal Laws* 37 (1970). The "unusually broad reach [of §1952] based upon the traditional jurisdictional pegs used and the number of offenses to which they are applicable" (*Id.* at 38) has, however raised a serious question concerning the traditional balance of power between state and federal governments in policing criminal violations. In the past, this Court has refused to permit federal jurisdiction created by statute to infringe unduly on the area of law enforcement reserved primarily to the states in the absence of clear legislative intent to do so. *See, e.g. United States v. Five Gambling Devices,* 346 U.S. 441 (1953); *Apex Hosiery Co. v. Leader,* 310 U.S. 469 (1940); *Federal Trade Com-*

mission v. Bunte Bros. Inc., 312 U.S. 349 (1941). As this Court stated in *United States v. Bass*, 404 U.S. 336, 349 (1971), "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance."

The Courts which have considered the scope of 18 U.S. §1952 and decided against the assertion of federal jurisdiction have exhibited a concern that §1952 would convert a substantial number of essentially state crimes into federal violations by the fortuitous and incidental use of interstate facilities and, as a result, would seriously upset the traditional federal-state balance. *See, e.g., United States v. Isaacs*, 493 F.2d 1124, 1147 (7th Cir. 1974), *cert. denied*, 42 U.S.L.W. 3692 (U.S. June 17, 1974); *United States v. Altobella*, 442 F.2d 310, 314-315 (7th Cir. 1971); *United States v. Archer*, 486 F.2d 670, 677-680 (2d Cir. 1973), *reh. denied* 486 F.2d 683. But, the Fourth Circuit in the present case has determined that the judiciary lacks the power to curb the reach of §1952, no matter how desirable such action might be, where, as here, the actions of the petitioners come within the literal language of the statute. *See* p. 10a of the Appendix hereto. The Court below placed the onus on the executive branch to deal with the problem of expanding federal jurisdiction and, in so doing, has revealed a marked disagreement in philosophy between those Circuits willing to protect and foster the balance of power between the state and federal governments and those Circuits which chose to enforce federal criminal statutes "as written" leaving the burden of curtailing federal jurisdiction to prosecutorial discretion. *See* p. 14a of the Appendix hereto.

In *Rewis v. United States*, 401 U.S. 808 (1971), this Court indicated that an expansive reading of §1952

> . . . would alter sensitive federal-state relationships, could overextend limited federal police resources and might well produce situations in which the geographic origin of customers, a matter of happenstance would transform relatively minor state offenses into federal felonies. 401 U.S. at 812.

Petitioners ask this Court to determine whether the concern for federalism exhibited on the *Rewis* facts and in other cases cited above requires that a less expansive interpretation be given to 18 U.S.C. §1952 in the present case.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

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January 17, 1975

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 74-1239

United States of America,

Appellee,

versus

Louis Gustav LeFaivre,
Louis Gustav LeFaivre, Jr.,
Sheila Elizabeth Eckert,
Norma Leigh Miller,

Appellants.

Appeal from the United States District Court for the District of Maryland, at Baltimore, Edward S. Northrop, District Judge.

(Argued September 30, 1974
Decided December 4, 1974)

Before CRAVEN, BUTZNER, AND FIELD,
Circuit Judges.

Marvin J. Garbis (Allen L. Schwait and Garbis and Shwait on brief) for Appellants; James A. Rothschild, Attorney, United States Department of Justice, (George Beall, United States Attorney, William Pope, Special Attorney, Baltimore Strike Force, and Jerome M. Feit, Attorney, United States Department of Justice, on brief) for Appellee.

CRAVEN, Circuit Judge:

This appeal presents an interesting aspect of federalism: to what extent should the United States participate with the states in the attempt to control human behavior by the imposition of criminal sanctions. Tradition and history assign a subordinate role to the United States. The burden of policing behavior by application of criminal law remains heavily upon the states and the proper role of the United States has been termed ancillary or auxiliary to that of the states. *See* 1 National Commission on Reform of Federal Criminal Laws, Working Papers 33-36 (1970). Nevertheless, Congress by various statutes has made possible federal prosecution of a great many crimes that seem to have little or no correlation to traditional federal interests. *See, e.g.*, Mann Act, 18 U.S.C. § 2421 (1970); Dyer Act, 18 U.S.C. § 2312 (1970).

The statute involved here is 18 U.S.C. § 1952, sometimes known as the "Travel Act," and entitled by the Congress "Interstate and Foreign Travel or Transportation in Aid of Racketeering Enterprises." It represents the most extensive recent entry by the Congress into the substantive criminal law field. Pegged upon the congressional power over interstate and foreign commerce and the mails, the statute undertakes to make federal crimes out of business enterprises that involve gambling, non-taxpaid liquor, narcotics, prostitution, extortion, bribery, and arson.

We are here concerned with gambling. Appellants were convicted by a jury of participating in varying degrees in a rather large gambling operation[1] conducted entirely within the State of Maryland and mostly within the City of Baltimore. Appellant Louis LeFaivre, Sr., was the backer for the entire operation; appellant Louis LeFaivre, Jr., was one of his

[1] The indictment charged that during the years 1968, 1969, and 1970, LeFaivre (or other defendants) cashed checks and other negotiable instruments totalling approximately $1,500,000. This figure is an indication of the size of the LeFaivre operation.

lieutenants; and appellants Miller and Eckert were "telephone girls" who recorded daily bets taken by the "writers" located throughout the city. Some of the many "writers" received as much as $1,000 or even $2,000 in bets weekly. But the only established connection with interstate commerce, the jurisdictional peg for application of the statute, was the introduction at trial of 14 out-of-state checks and other negotiable instruments offered in settlement of bets and passed through interstate banking channels in the clearing process after being cashed or deposited by one of the principal defendants.

Not unreasonably, appellants characterize their gambling enterprise as "local" as opposed to interstate. They urge on appeal that the Travel Act was not intended to apply and does not apply to a local gambling operation with only incidental use of facilities in interstate commerce. We disagree. Appellants' arguments come to this: that the Congress in the exercise of its power over the instrumentalities of commerce ought not to undertake to reach criminal activity that is primarily local in nature, but should instead leave policing of such criminal activity to the states.[2] We think the argument is addressed to the wrong forum and that it is not for the courts to interpose restraints so long as the Congress has acted within the proper scope of its powers.[3] The convictions will be affirmed.

[2] The issues as framed by appellants are these, with our answers bracketed:

1. Does 18 U.S.C. § 1952 (The Travel Act) apply to a local gambling operation where the use of interstate facilities was, at most, the cashing of fourteen checks drawn on out of state banks? [Yes]

2. Under 18 U.S.C. § 1952 must the use of interstate facilities be more than minimal or merely incidental to a local gambling operation? [No]

3. Under 18 U.S.C. § 1952 is knowledge or intent regarding the use of interstate facilities required to any degree? [No]

[3] There is no constitutional issue presented on appeal. Since it is assumed that Congress acted within its power we need not concern ourselves with the extent of such power.

I.

The language of the Travel Act literally covers this gambling operation involving 14 out-of-state negotiable instruments. In relevant part, the Act states that "[w]hoever . . . uses any facility in interstate or foreign commerce, including the mail, with intent to . . . carry on, or facilitate the . . . carrying on, of any unlawful activity [gambling], and thereafter performs or attempts to perform [any business enterprise involving gambling] shall be fined not more than $10,000 or imprisoned for not more than five years, or both.[4] The words fit the facts of this case: LeFaivre *used* facilities in interstate

[4] The statute reads in full as follows:

Interstate and foreign travel or transportation in aid of racketeering enterprises.

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury.

18 U.S.C. § 1952 (Supp. 1974).

commerce each time he deposited or cashed one of the 14 out-of-state checks received from his writers. His intention was to collect money and thus to *carry on or* facilitate the carrying on of his enterprise. And since the gambling operation was ongoing over a period of years, there can be no doubt that LeFaivre and the others continued to perform their illegal activity *after* the use of interstate facilities, thus meeting the Act's requirement that a person engage in the substantive offense following the involvement of interstate commerce.

In *United States v. Wechsler,* 392 F.2d 344 (4th Cir.), *cert. denied,* 392 U.S. 932, *reh. denied,* 393 U.S. 902 (1968), we upheld a Travel Act conviction founded upon a local zoning board official's deposit into his bank account of an out-of-state check received as a bribe. As we said then, "[w]hen one deposits a check, there would seem to be little doubt that he is using a facility in interstate commerce."[5] 392 F.2d at 347 n.3; *cf. United States v. Barnes,* 383 F.2d 287, 290 (6th Cir. 1967), *cert. denied,* 389 U.S. 1040 (1968). In *United States v. Salsbury,* 430 F.2d 1045 (4th Cir. 1970), a Maryland nightclub operator financed large-scale illegal gambling operations in which bettors often paid their bookies by check or money order, which the nightclub operator cashed at a local drugstore. We held the government could prosecute Salsbury under the Travel Act because some of the checks were on out-of-state banks.

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[5] The Seventh Circuit has recently taken issue with this statement from *Wechsler.* In United States v. Isaacs, 493 F.2d 1124, 1149 (7th Cir. 1974), *cert. denied,* 42 U.S.L.W. 3692 (U.S. June 17, 1974), that court stated its disagreement with the statement "because it suggests that the check need not actually travel interstate." The court pointed out that the statute explicitly requires some actual use of an interstate facility *for the purpose of* interstate travel or an interstate transaction, rather than merely the use of an interstate facility for an *intra*-state purpose. 493 F.2d at 1149 n.1. We acknowledge the ambiguity, and agree that there must be some utilization of a facility in an *inter*state transaction to invoke the Travel Act.

But appellants urge that *Wechsler* and *Salsbury* have been destroyed by *Rewis v. United States*, 401 U.S. 808 (1971). In *Rewis*, the Supreme Court held that the Travel Act could be applied neither to persons who crossed state lines for the purpose of frequenting a local gambling establishment, nor — considering solely the the fact of their customers' travel across state lines — to the operators of the establishment. Appellants rely on the discussion in *Rewis* of the legislative history behind the Travel Act, which they argue suggests that Congress did not intend to reach purely local operations like LeFaivre's. The Court in *Rewis*, while noting that legislative history of the statute was "limited," did divine from it that the Act was aimed "primarily at organized crime and, more specifically, at persons who reside in one State while operating or managing illegal activities located in another." 401 U.S. at 811. The Court also noted that the legislative history evidenced no consideration by Congress of the effect on "sensitive federal-state relationships" and "limited federal police resources" that would result if the Act were read to cover local gambling operations, even those located in multi-state metropolitan areas, just because they were frequented by out-of-state customers. *Id.* at 812.

In addition to *Rewis*, appellants also cite us to later decisions of the Seventh and Second Circuits applying *Rewis*. In *United States v. Altobella*, 442 F.2d 310 (7th Cir. 1971), the Seventh Circuit reversed a Travel Act conviction based on an extortion victim's payment with funds procured by cashing an out-of-state check, which like the checks in the instant case had to travel in interstate commerce in order to be cleared. The Seventh Circuit based its decision in part on the "minimal and incidental" nature of the involvement of interstate facilities, stating that it did not believe Congress intended "to authorize federal intervention in local law enforcement in a marginal case such as this." 442 F.2d at 315, 316. One month after *Altobella, in United States*

[6] In their reply brief appellants also cite us to United States v. Isaacs, 493 F.2d 1124 (7th Cir. 1974), *cert. denied*, 42 U.S.L.W. 3692 (U.S. June 17, 1973). In *Isaacs*, the government

v. McCormick, 442 F.2d 316 (7th Cir. 1971), the Seventh Circuit reaffirmed its reading of the Travel Act in a short per curiam opinion reversing the conviction of a lottery operator who, although he actually employed only local people, did advertise for employees in a newspaper that reached some out-of-state subscribers. The court based this decision on *Rewis* and *Altobella*, noting only that "[t]he role played by the interstate mailings was 'a matter of happenstance' and 'minimal and incidental' to the operation of the illegal lottery." 442 F.2d at 318.

The final post-*Rewis* opinion relied upon by appellants is that of Judge Friendly in *United States v. Archer*, 486 F.2d 670 (2d Cir. 1973), *reh. denied, id.* at 683 (per curiam). The facts in *Archer* presented a rather unpretty picture of government investigators using the ruse of a planted agent to induce suspected criminals into committing overt acts for which they could be charged. The Travel Act was said to be invoked by a single telephone call placed by a government agent from Paris and received by one of the suspected criminals in New York. After examining the legislative history of the Travel Act at length and considering the *Rewis*, *Altobella*, and *McCormick* decisions, the Second Circuit decided that the telephone call could not support a Travel Act prosecution, both because the call's transatlantic nature was "a matter of happenstance," *see Rewis*, 401 U.S. at 812, and because the receipt of an interstate or international phone call seemed analogous to the receipt of gambling customers across state lines that the Supreme Court in *Rewis* had held to be insufficient for invocation of the Act. 486 F.2d at 682-83.

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based its prosecution under the Travel Act on the travel in interstate banking channels of three checks received by participants in a bribery scheme and deposited by them at their local banks. Relying on its reading of *Rewis*, *Altobella*, and *McCormick*, the Seventh Circuit in *Isaacs* concluded that the use of interstate facilities was "so minimal, incidental, and fortuitous, and so peripheral" to the activities of the participants in the bribery scheme that the Act could not be applied. 493 F.2d at 1146.

Appellants contend that the *Altobella, McCormick* and *Archer* decisions, correctly explicating *Rewis,* have applied a judicial gloss to the literal words of the Travel Act that merits our adoption and compels reversal of their convictions in this case. They contend that we, like the Seventh and Second Circuits,[7] should require a *substantial* and *integral* involvement of interstate facilities in an illegal activity, as opposed to a purely *minimal* and *incidental* involvement, before we uphold a prosecution under the Act. From a policy standpoint they argue that adoption of such a distinction would have the salutary effect of limiting coverage of the Act to organized crime involving several states, where local law enforcement officials are hindered by the very scope of the operations, and leaving more local activities to the local authorities. Of more immediate concern to appellants than the policy argument, no doubt, is the fact that such a distinction would also make it impossible to uphold their convictions, since the number of out-of-state instruments involved in LeFaivre's operation was apparently minimal relative to the volume of business conducted, and their involvement at all was arguably fortuitous and incidental, and certainly not vital to the operation of the gambling enterprise.

Assuming for the moment that the post-*Rewis* decisions relied upon by appellants were correctly decided, we believe each can be readily explained by factors having nothing to do with a narrow or restricted reading of the Travel Act. In *Altobella,* the Seventh Circuit based its decision in large part upon the absence of any significant criminal activity transpiring *after* the

[7] *See also* United States v. Vitich, 357 F. Supp. 102, 104 (W.D. Wis. 1973), where Judge Doyle interpreted the *Altobella* and *McCormick* decisions as follows:

> From these decisions it appears that there are two predominant factors bearing on the question whether the interstate activities of an unlawful operation bring it within the ambit of the Travel Act: (1) the significance of the role of the interstate activity in the unlawful operation; (2) whether the use of interstate facilities was a matter of happenstance or a conscious decision on the part of the defendant.

use of interstate commerce channels, an explicit requirement of the Travel Act on its face. 442 F.2d at 314-15. In our case, an ongoing gambling enterprise, there was significant criminal activity following each use of facilities in interstate commerce.

The *Archer* court focused on what it considered the despicable police maneuver of planting an agent to initiate a monitorable criminal scheme. It came close to reversing the convictions solely on the ground of "government lawlessness" as defined in Justice Brandeis' famous dissent in *Olmstead v. United States*, 277 U.S. 438, 485 (1928). *See* 486 F.2d at 674-77. Backing off from that ground of decision, the court ultimately based its reversal on insufficient use of interstate channels to bring the Travel Act into play. But on the government's petition for rehearing, the Second Circuit panel in a per curiam statement explained its decision in very narrow terms:

> While the government professes alarm at the precendential effect of our decision, we in fact went no further than to hold that when the federal element in a prosecution under the Travel Act is furnished solely by undercover agents, a stricter standard is applicable than when the interstate or foreign activities are those of the defendants themselves and that this was not met here.

486 F.2d at 685-86. That can be read to mean that the *Archer* opinion was virtually withdrawn. But in any event, that decision is distinguishable from the instant case on either of two grounds: the unsavory police practices that colored that decision, or the government initiation of the interstate aspect of the criminal activity, neither of which we have on the record before us.

In *McCormick* the government based its Travel Act prosecution on the defendant lottery operator's advertisement for lottery salesmen in a local newspaper that had some out-of-state subscribers. But the defendant in fact employed no salesmen from out-of-state, and it is arguably true that he did not "use" the interstate aspect

of the newspaper. In our case, LeFaivre did, of course, benefit from the use of interstate banking channels.

The precise factual settings of the Second and Seventh Circuit decisions raise some doubt as to whether, in an ordinary case, those circuits would read into the Travel Act a requirement of "substantial and integral" involvement in interstate commerce. It is possible those cases may be confined to their facts. If not, we decline to follow them and reject any narrowly restrictive reading of the Act.

We reiterate that the facts bring this case squarely within the *plain language* of the Travel Act. The Congress chose to trigger application of the Travel Act by the use of "any facility in interstate or foreign commerce." It did not provide that such use must be "substantial" nor, so far as we can ascertain, has it ever done so in any other federal criminal statute pegged to the use of interstate facilities. The Congress did not exclude from application of the statute the use of facilities in commerce that might be termed "minimal and incidental," nor has the Supreme Court done so, we think, in *Rewis*. However desirable it may seem to curb the reach of this criminal statute, *see Archer, supra,* 486 F.2d at 677-78, we think we lack the power to do so. Once it is determined that the Congress has acted constitutionally and within the scope of its powers (and that is here conceded), and that its statute reaches given activity, we think the inquiry must come to an end.

We are, of course, bound by any construction put upon a statute by the Supreme Court; but we discern none in *Rewis* that prevents application of the Travel Act to these appellants. Mr. Justice Marshall's opinion for the Court does discuss legislative history and federalism in terms that suggest the Act should not be read to cover every situation it could *conceivably* reach. But he spoke in the context of a fact situation that would have required *extending* the coverage of the Act *beyond* its literal language:

> [W]e are unable to conclude that conducting a gambling operation frequented by out-of-state bettors, by itself, violates the Act. Section 1952 prohibits interstate travel with the intent to "promote, manage, establish, carry on, or facilitate" certain kinds of illegal activity; and *the ordinary meaning of this language* suggests that the traveler's purpose must involve more than the desire to patronize the illegal activity.

401 U.S. at 811 (emphasis added).[8] Having determined that the *plain language* did *not* cover the situation in *Rewis*, Mr. Justice Marshall then launched into his discussion of legislative history and federalism, so heavily relied upon by appellants here. At the conclusion of that discussion he summed up: "In short, *neither statutory language nor legislative history* supports such a broad-ranging interpretation of § 1952 [as urged in *Rewis*]."

[8] Justice Marshall's concern with the purpose of the *bettors* in traveling interstate, when he was in fact dealing with the convictions of the *gambling establishment operators*, requires a brief explanation. The government in *Rewis* had originally prosecuted both the bettors who traveled interstate and the operators who received them. Only the bettors themselves could be prosecuted directly under the Travel Act, however, since owners of the gambling establishment did not travel interstate or use interstate facilities. In order to prosecute the establishment owners, the government relied upon 18 U.S.C. § 2, the general aiding and abetting statute, on the theory that the establishment owners were aiding and abetting the Travel Act violations of those who traveled interstate to their establishments. The Fifth Circuit reversed the convictions of the bettors under the Act, *see* 418 F.2d 1218, and the Supreme Court in *Rewis* summarily affirmed that action, stating simply that "it cannot be said, with certainty sufficient to justify a criminal conviction, that Congress intended that interstate travel by mere customers of a gambling establishment should violate the Travel Act." 401 U.S. at 811. In considering the establishment operators' convictions, however, Justice Marshall still had to focus on the travel of the bettors, since the aiding and abetting convictions of the operators were derivative of the alleged violations by the bettors. Thus the focus on the bettors' travels in the language quoted in the text.

Id. at 812 (emphasis added). Thus, both the language and the structure of the opinion show that the Court in *Rewis* considered itself faced with the question of whether to *broaden* the coverage of the Travel Act *beyond* the ordinary meaning of its language. In such a situation, where a statute can be liberally interpreted to reach conduct outside its plain language, it is entirely appropriate to look, as did the Supreme Court, to the legislative history to determine whether such an extension would further congressional purposes.

In contrast, when a statute on its face clearly covers certain activity, as in the instant case, we believe a court should accept the statute as written and avoid plunging into the murky waters of legislative history in an attempt to fathom whether Congress really intended to reach what the language of its statute *does* reach. *See United States v. Oregon,* 366 U.S. 643, 648 (1961); *United States v. Barnes,* 383 F.2d 287, 289 n.2 (6th Cir. 1967) *cert. denied,* 389 U.S. 1040 (1968); *cf. Dameron v. Brodhead,* 345 U.S. 322, 326 (1953). For, as the Supreme Court has said, "[t]he plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction." *Gemsco, Inc. v. Walling,* 324 U.S. 244, 260 (1945). *See also Ex Parte Collett,* 337 U.S. 55, 61 (1949). Put another way, to look to legislative history in this case would be to no end, since "[w]here the language of a statute is plain, there is nothing to construe." *Hengesbach v. Hengesbach,* 114 F.2d 845, 846 (D.C. Cir. 1940).

Furthermore, as Judge Friendly expressed at one point in his *Archer* opinion, 486 F.2d at 680, we do not believe it is normally a proper judicial function to try to cabin in the plain language of a statute, even a criminal statute, by limiting its coverage to the *primary* activity Congress had in mind when it acted.[9] *See United States*

[9] Judge Friendly noted in Archer not only that the Travel Act on its face reaches many more activities than the legislative history showed Congress intended to reach, but

v. Roselli, 432 F.2d 879, 885 (9th Cir. 1970), *cert. denied*, 401 U.S. 924 (1971). As recently stated by Judge Boreman of this circuit, the proper approach is to "look to the unambiguous words of the criminal statute to determine its meaning and not to the purported intentions of a congressional committee." *United States v. White*, 475 F.2d 1228, 1234-35 (4th Cir. 1973). To do otherwise could lead to great uncertainty concerning exactly what activity is proscribed by a given statute. It could also transform every criminal appeal into a scouring of the legislative history of the relevant statutes to determine whether the legislature addressed itself to the precise activity engaged in by the particular defendant. There is already enough to litigate about without that. *Cf. United States v. Miller*, 379 F.2d 483, 488 (7th Cir.), *cert. denied*, 389 U.S. 930 (1967); 1 National Commission on Reform of Federal Criminal Laws, Working Papers 37-38 (1970).

Nor does the so-called "rule of lenity," *Bell v. United States*, 349 U.S. 81, 83 (1955), cited by Mr. Justice Marshall in *Rewis*, 401 U.S. at 812, and invoked by appellants here, have any place in our analysis. That "rule," which requires that criminal statutes be interpreted in favor of leniency to the accused, "only serves as an aid for resolving an ambiguity; it is not to be used to beget one." *Callanan v. United States*, 364 U.S. 587, 596 (1961). There is no ambiguity in the statute as applied to the facts of this case.

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that the body of the statute was strikingly broader in scope than its title would suggest:

> The title refers only to interstate and foreign travel or transportation; yet the text also includes the use of any facility in interstate or foreign commerce. The title refers only to acts "in aid of racketeering enterprises"; yet the definition of "unlawful activity" in the text displays no such limitation.

486 F.2d at 678. But just as he acknowledged that courts could not rightly limit an act to Congress's primary purpose in passing it, he also recognized, as do we here, that "[i]t would go beyond the proper exercise of judicial power for courts to confine the Travel Act to its title." *Id.* at 680, *citing* Frazer v. United States, 145 F.2d 139, 142 (6th Cir. 1944), *cert. denied*, 324 U.S. 849 (1945).

How far Congress should extend federal criminal jurisdiction is a matter of interest and concern to the judicial branch. But resolution of the question is not for us. There is an appropriate role, however, for the executive branch. We agree with Judge Friendly, who said in *Archer*, 486 F.2d at 678, that the responsibility for keeping federal criminal prosecutions within appropriate bounds for a federal system rests, in the first instance, with United States attorneys under the active guidance of the Attorney General. *SEE* Friendly, Federal Jurisdiction: A General View 55-61 (1973).

It should be emphasized that the exercise of prosecutorial discretion is common. The Mann Act fits the adulterer who chooses another state as the place of assignation, but such cases rarely if ever appear in a federal court. When an Asheville, North Carolina, thief steals a car, he has two or more choices of how to drive it to Charlotte — no one of which is better than another. But one way will take him through the edge of South Carolina, and that "happenstance" will undoubtedly invoke the Dyer Act. These two kinds of cases — prostitution and car theft — are triggered identically as is the application of the Travel Act. "The sole reason for conditioning the statutes' prohibitions upon use of interstate commerce is to provide a constitutional basis for the exercise of federal power." *United States v. Roselli, supra,* 432 F.2d at 891.[10]

[10] In the course of analyzing 18 U.S.C. § 1343 (1970) the Second Circuit has said:

> The use of interstate communication is logically no part of the crime itself. It is included in the statute merely as a ground for federal jurisdiction.

United States v. Blassingame, 427 F.2d 329, 330 (2d Cir. 1970), *cert. denied*, 402 U.S. 945 (1971). This court in *Salsbury, supra,* 430 F.2d at 1048 stated that "the legislative history of § 1952 indicates that interstate facilities, including the mails, are jurisdictional means through which federal officers can assist local law enforcement." We adhere to that view. *See* H.R. Rep. No. 966, 87th Cong., 1st Sess., reprinted in 2 U.S. Code Cong. & Adm. News 2664 (1961).

We think the solution to the problem of expanding federal criminal jurisdiction is not for the courts to deny that the jurisdiction exists and that Congress may implement it but instead for the executive branch to exercise wisely the discretion vested in it by the Congress.[11] We hold, therefore, that when the ordinary meaning of the Travel Act clearly covers an activity, we will not read into the Act any requirement that travel in interstate commerce or use of facilities in interstate commerce be a "substantial" or an "integral" part of the activity. Instead, we will apply the Act as it is written.[12]

II.

As an alternative to their argument that the interstate aspects of LeFaivre's operation were insufficient as a matter of law to bring the Travel Act into play, appellants contend that the issue of sufficiency of use of interstate facilities should have gone to the jury as a factual question. What we have said previously also disposes of this assignment of error. We hold the district judge correctly charged the jury as follows:

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[11] The Final Report of the National Commission on Reform of Federal Criminal Laws contains a section 207 entitled "Discretionary Restraint in Exercise of Concurrent Jurisdiction." This is a carefully-worded provision affording federal law enforcement agencies clear guidelines as to whether or not it is appropriate and desirable in a federal system to initiate prosecution in a given case or to leave the matter to the operation of the criminal laws of the states.

[12] When the words of the statute, given their normal meaning do *not* clearly cover an activity — as was the case in *Rewis* — our approach will necessarily be different. As did the Supreme Court in *Rewis*, we will then have to determine whether application of the Act to the particular defendant would further Congress's purpose in passing the statute, or would instead tend to pervert congressional intent. In such cases we will be governed by the maxim reiterated by the Supreme Court in *Rewis* itself, that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." 401 U.S. at 812, *citing Bell v. United States*, 349 U.S. 81, 83 (1955).

> Section 1952 does not require that the use of facilities in interstate commerce have been essential to the gambling business allegedly operated by the Defendants; that use need only facilitate the promotion, management, establishment, or carrying on of the illegal gambling business.

Tr. at 961, quoted in Appendix for Appellants at 117.[13]

III.

The trial judge charged the jury, with respect to both the conspiracy charge and the substantive Travel Act charges, that a guilty verdict required neither a finding that the defendants intended to use facilities in interstate commerce, nor a finding that they knew they were using such facilities.

We think the plain language of § 1952 disposes of the contention of the LeFaivres, who actually cashed the checks involved here, that the statute requires a *knowing* use of facilities in interstate commerce. Nothing is said about knowledge. The language embraces "[w]hoever . . . uses any facility in interstate commerce." There is sufficient *mens rea* if there is "intent to . . . promote, manage, establish, carry on, or facilitate the promotion [etc.] of any unlawful activity." The statute speaks only to the *purpose* for which one uses interstate facilities, not the *knowledge* with which one does so. *See United States v. Roselli, supra,* 432 F.2d at 890-91; *United States v. Bash,* 258 F. Supp. 807, 809-12 (N.D. Ind. 1966), *aff'd sub nom. United States v. Miller, supra,* 379 F.2d 483.[14]

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[13] To the extent that United States v. Presley, 478 F.2d 163 (5th Cir. 1973), on which appellants rely, suggest that the substantiality and essentiality issues should go to the jury, we simply believe that decision is wrong.

[14] Congress's omission of any knowledge requirement with respect to the use of facilities in interstate commerce makes good sense. The use of facilities in interstate commerce is, as we noted above in this opinion, nothing more than the jurisdictional peg on which Congress based federal jurisdic-

Appellants Miller and Eckert, who acted only as "telephone girls" in receiving bets, urge upon us that since they handled no checks and thus did not "use" a facility in interstate commerce, their substantive convictions cannot be sustained. They would be right but for 18 U.S.C. § 2 (1970), which makes aiders and abettors principals.

In upholding Miller's and Eckert's convictions we necessarily refuse to adopt the reasoning of the Sixth Circuit in *United States v. Barnes*, 383 F.2d 287, 289-93 (6th Cir. 1967), *cert. denied*, 389 U.S. 1040 (1968), which Miller and Eckert rely upon here. The Sixth Circuit stated that in order to convict one who did not actually use a facility in interstate commerce, it would be necessary to prove that the person "reasonably could be expected to know of the commission of the forbidden acts" by some other participant in the scheme. 383 F.2d at 292. *cf. United States v. Salsbury, supra*, 430 F.2d at 1049-50. The court in *Barnes* in effect adopted a "sliding scale" with respect to the knowledge requirement, in which the degree of knowledge of the interstate element

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tion over the unlawful activities enumerated in the Travel Act. The use of interstate facilities adds nothing whatsoever to the "criminality" of the person who is already engaged in one of the named unlawful activities. Thus, there is no need to require any mental element with respect to use of interstate facilities, since any mental element that Congress did write in would still not be any part of the *mens rea* of the criminal activity itself. *Cf.* Lambert v. California, 355 U.S. 225 (1957); Morissette v. United States, 342 U.S. 246 (1952). Similar considerations have led Congress to omit any mental element with respect to the jurisdictional component of several other statutes, and have led courts to uphold those statutes as written. *E.g.*, 18 U.S.C. § 201 (b) (1) (1970) (bribery of a federal official); 18 U.S.C. 111 (1970) (assault of a federal official in performance of his federal duty); 18 U.S.C. § 2313 (1970) (receipt of stolen vehicles moving in interstate commerce). *See* United States v. Alsondo, 486 F.2d 1339, 1342 (2d Cir. 1973); United States v. Jennings, 471 F.2d 1310, 1312 (2d Cir. 1973); United States v. Bolin, 423 F.2d 834, 836-37 (9th Cir. 1970); National Commission on Reform of Federal Criminal Laws, Proposed New Federal Criminal Code § 204, Comment (Final Report, 1971).

required to convict a defendant would increase the further the defendant was from the actual use of the facilities in interstate commerce. *See also Twitchell v. United States,* 313 F.2d 425, 429 (9th Cir. 1963), *vacated and remanded sub nom. Rogers v. United States,* 376 U.S. 188 (1964). Appellants Miller and Eckert have paraphrased that argument to say that since they were "peripheral figures" in the gambling scheme in so far as the handling of money was concerned, the jury should have been required to find either actual knowledge or some degree of probability of knowledge on their part of the use of interstate facilities.

We disagree. Since Congress did not require knowing use of interstate facilities on the part of the person who *directly* violates the Travel Act, we see no justification for requiring that one who aids him in the underlying unlawful activity have more knowledge than he does. Holding Miller and Eckert liable as aiders and abettors despite their lack of knowledge of LeFaivre's use of interstate facilities is not the same thing, contrary to the Sixth Circuit's fears, *see Barnes,* 383 F.2d at 292, as holding them liable for *any* independent crime committed by LeFaivre in furtherance of the gambling operation and without their knowledge. The reason is simple. The use of interstate facilities is not a crime requiring an additional *mens rea* beyond that required for participation in the gambling activity itself; it is just an act that confers federal jurisdiction over the underlying gambling activity, and nothing more. In this respect it differs from robbery of a bank — which LeFaivre might also have done in furtherance of his gambling operation, if he had fallen into debt — because robbery of a bank requires an independent *mens rea* beyond that involved in the gambling operation itself. Assuming they were unaware of it, Miller and Eckert could not be prosecuted as aiders and abettors of the bank robbery because of this distinction, since an aider and abettor must have the same *mens rea* as the principal actor. *See Snyder v. United States,* 448 F.2d 716, 718 (8th Cir. 1971).

Alternatively, we sustain the Travel Act convictions of Miller and Eckert on the rationale of *Pinkerton v. United States*, 328 U.S. 640 (1946), also charged by the trial judge below, Tr. at 963-64, quoted in Appendix for Appellants at 119-20; *see Nye & Nissen v. United States*, 336 U.S. 613, 618 (1949), that they were willing members of the conspiracy in furtherance of which the acts constituting substantive Travel Act violations were committed.

As a separate point, appellants argue that even if no knowledge of use of facilities in interstate commerce is required for a substantive violation of the Travel Act, such knowledge and even a specific intent to use interstate facilities is necessary for a *conspiracy* to violate the Travel Act. Appellants' argument is based on the premise that conspiracy is a specific intent crime: in order to "conspire," persons must plan to do something specific. While appellants' premise is indeed black-letter law in most situations,[15] there is presently sharp disagreement over whether or not such conspiratorial knowledge and intent is required with respect to the jurisdictional element of a federal crime. The Sixth Circuit has held that such knowledge and intent is required with respect to the jurisdictional element of the Travel Act, *United States v. Barnes, supra*, 383 F.2d at 289-93, and the Second Circuit has recently reaffirmed its view that such knowledge and intent is required with respect to the jurisdictional element of all conspiracies to commit federal crimes, *United States v. Alsondo*, 486 F.2d 1339, 1342-44 (2d Cir. 1973), *cert. granted sub nom. United States v. Feola*, 42 U.S.L.W. 3584 (U.S. April 15, 1974). *See also Nassif v. United*

[15] The concept of conspiracy as a specific intent crime, regardless of the nature of the underlying substantive offense, was best expressed by Judge Learned Hand in United States v. Crimmins, 123 F.2d 271, 273 (2d Cir. 1941):

> While one may, for instance, be guilty of running past a traffic light of whose existence one is ignorant, one cannot be guilty of conspiring to run past such a light, for one cannot agree to run past a light unless one supposes that there is a light to run past.

States, 370 F.2d 147, 152 (8th Cir. 1966). But the Ninth Circuit has decided against any such requirement, *United States v. Roselli, supra,* 432 F.2d at 891-92, and the drafters of both the Model Penal Code and the Proposed New Federal Criminal Code have proposed its abolition in all cases. *See* ALI, Model Penal Code § 5.03, Comment, at 112 (Tent. Draft No. 10, 1960); National Commission on Reform of Federal Criminal Laws, Proposed New Federal Criminal Code § 203(1), Comment, and §1004(1), Comment 2 (Final Report, 1971). We agree with the Ninth Circuit and with the drafters of the model codes. The jurisdictional element should be viewed for purposes of the conspiracy count exactly as we view it for purposes of the substantive offense — simply as a jurisdictional peg on which to hang the federal prosecution. Whether or not certain conspirators actually anticipate the use of facilities in interstate commerce when they plan their unlawful activity of gambling, bribery, etc., adds absolutely nothing to the dangerousness of their scheme to the public weal. And it is the danger posed by a conspiracy that justifies prosecution of the inchoate "crime" of conspiracy even before any substantive offense has been committed. *See United States v. Roselli, supra,* 432 F.2d at 891-92 & n.18. We think the trial judge's charge on the conspiracy count is correct.

IV.

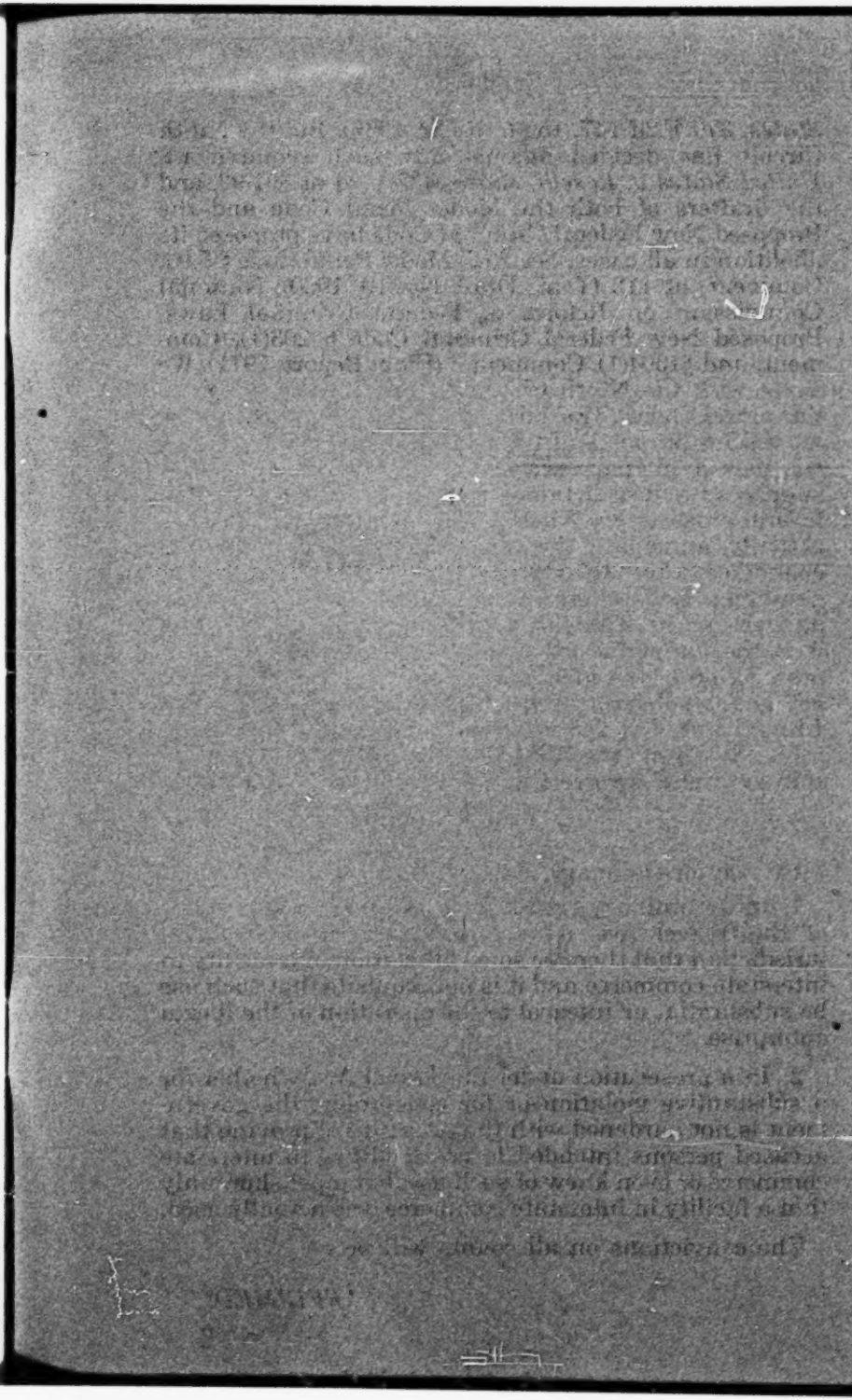
By way of summary, we hold:

1. In an ordinary case falling within the clear ambit of the Travel Act, it is sufficient to invoke federal jurisdiction that there be some utilization of a facility in interstate commerce and it is not requisite that such use be substantial or integral to the operation of the illegal enterprise.

2. In a prosecution under the Travel Act, whether for a substantive violation or for conspiracy, the government is not burdened with the necessity of proving that accused persons intended to use facilities in interstate commerce or even knew of such use, but must show only that a facility in interstate commerce was actually used.

The convictions on all counts will be

AFFIRMED.



In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-899

LOUIS GUSTAV LEFAIVRE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App.) is reported at 507 F. 2d 1288.

JURISDICTION

The judgment of the court of appeals was entered on December 4, 1974. A timely petition for rehearing *en banc* was denied on December 23, 1974. The petition for a writ of certiorari was filed on January 22, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the petitioners violated the Travel Act by cashing of out-of-state checks in connection with their illegal gambling operation.

2. Whether, contrary to its plain language, a requirement of substantial use of interstate facilities should be read into the Travel Act.

3. Whether in a prosecution for conspiracy to violate the Travel Act each conspirator must be shown to have known that interstate facilities were being used in furtherance of the conspiracy.

STATEMENT

After a jury trial in the United States District Court for the District of Maryland, petitioners, Louis Gustav LeFaivre, Louis Gustav LeFaivre, Jr., Sheila Elizabeth Eckert, and Norma Leigh Miller, and others were convicted of offenses involving the use of interstate facilities in aid of a gambling enterprise, in violation of 18 U.S.C. 1952 (the Travel Act).[1] Petitioners were each convicted of one count of conspiracy to violate the Travel Act and eleven counts charging substantive violations of the Travel Act. Petitioner Louis LeFaivre, Sr. was sentenced to the custody of the Attorney General for study and report pursuant to 18 U.S.C. 4208(b). Petitioner Louis LeFaivre, Jr. was sentenced to twelve concurrent one-year prison terms. Petitioners Sheila Eckert and Norma Miller were each sentenced to twelve concurrent nine-month prison terms.

1. The evidence showed that petitioner Louis LeFaivre, Sr., also known as Gus Funk, was the backer for a large numbers business that operated from his restaurant in Baltimore, Maryland, from 1967 to 1971 (Tr. 139, 349, 412, 435, 454, 487, 520-521, 545, 595, 615). LeFaivre's

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[1]Co-defendant Paul Hawse was also convicted of conspiracy and substantive offenses under 18 U.S.C. 1952. He was given a three-year sentence on the conspiracy count and concurrent three-year sentences on the twelve substantive counts. Co-defendants Raphael Nini, Joseph Joel Donati, Sam Clark, William Howard Phillips, Harry Carroll Stuller, Henry Joseph Sibiski, Samuel Edward Arthur, Howard Pemberton Brown, and Julius Askins all pleaded guilty to one count of the indictment. Co-defendant Augustine Charles Tamburello was acquitted of all charges against him.

son, petitioner Louis LeFaivre, Jr., and co-defendant Paul Hawse were his immediate subordinates in the operation (Tr. 105, 155), while his two daughters, petitioners Norma Leigh Miller and Sheila Elizabeth Eckert, were in charge of receiving and recording the daily bets taken over the telephone (Tr. 165-187, 437-438).[2]

LeFaivre, Sr. backed bets that were taken by number writers in various locations in the city. Most of the writers were employed at various jobs and would write numbers for their fellow employees. The writers would take numbers on a daily basis and then report them by telephone (Tr. 143, 352, 437). The writers received 15 percent to 20 percent on the numbers they wrote, with the remainder to LeFaivre, Sr. (Tr. 141, 415). Customarily, the bettors would not pay for their bets on a daily basis but instead would settle their accounts with the writer on Friday, which was usually payday. In order to collect for the bets that had been made during the week, the writers would often cash the bettor's payroll and other checks (Tr. 180, 355, 437, 526). In fact, as a number of writers testified, cashing checks was an essential part of the system, without which the numbers operation could not have existed (Tr. 150-151, 275, 521).

After the writers had collected from the bettors on Friday, they would take the cash and checks to LeFaivre, Sr. to settle with him (Tr. 150, 355, 415, 436, 521, 595). LeFaivre, Sr. would take the proceeds from the writer and deduct their commission of either 15 percent or 20 percent (Tr. 192). When checks were given in payment, each writer would put an identifying mark on the check so that, if the check bounced, LeFaivre, Sr. would know whom to hold responsible (Tr. 171, 193). LeFaivre, Sr. would then cash the checks, between thirty and seventy-five a week, at

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[2]Petitioner Miller was also shown to have cashed checks occasionally (Tr. 511).

one specific branch office of a Maryland bank (Tr. 375). The average amount of business for a particular writer varied. Some wrote up to one thousand dollars in bets a week, while others wrote about two thousand dollars weekly (Tr. 163).

In payment of debts by the bettors, and in settlement between the writers and LeFaivre, Sr., checks drawn on both local and out-of-state banks were used. At trial, the government introduced fourteen checks drawn on out-of-state banks that had been used by the various writers to settle their weekly accounts with LeFaivre, Sr.

Twelve of these checks (Government exhibits 1-4, 11-14, 17-20) bore LeFaivre, Sr.'s endorsement, while one was endorsed by co-conspirator Arthur Suter (Government exhibit 16). All of these checks were cashed at the Baltimore bank where LeFaivre, Sr. maintained two checking accounts; they were then sent through the facilities of interstate commerce to be cleared (Tr. 654, 660-668). Nine of these checks were checks drawn on out-of-state banks (Government exhibits 1-4, 13, 14, 17, 19, 20), four were United States Treasury checks (Government's exhibits 11, 12, 15, 16) and one was a telegraphic money order drawn on the Chase Manhattan Bank (Government's exhibit 18).

ARGUMENT

1. The holding of the court below that the cashing of out-of-state checks in a gambling operation comes within the purview of the Travel Act does not create a conflict in the circuits that warrants review by this Court; it is consistent with similar decisions by the Court of Appeals for the Fifth Circuit, in *Hanley* v. *United States*, 416 F. 2d 1160, certiorari denied, 397 U.S. 910, and the Court of Appeals for the Sixth Circuit, in *United States* v. *Barnes*, 383 F. 2d 287, certiorari denied, 389 U.S.

1040, as well as a previous decision by the Court of Appeals for the Fourth Circuit, in *United States* v. *Salsbury*, 430 F. 2d 1045.

While the Seventh Circuit has reversed Travel Act convictions involving the use of checks, none concerned a factual situation parallel to that presented here. In *United States* v. *Altobella*, 442 F. 2d 310 (C.A. 7), a single out-of-state check was used as the pay-off in an extortion scheme, while in *United States* v. *Isaacs*, 493 F. 2d 1124, 1146 (C.A. 7), certiorari denied, 417 U.S. 976, three checks used in a bribery scheme were drawn on an Illinois bank, cashed in Illinois, and cleared through the Federal Reserve Bank in St. Louis, Missouri. Indeed, in *Isaacs* the court stated its approval of the Fourth Circuit's decision in *United States* v. *Salsbury, supra* (493 F. 2d at 1148-1149).[3]

The Seventh Circuit has adopted what it calls a more "restrictive" test for reviewing Travel Act convictions. Compare *United States* v. *Isaacs*, *supra*, 493 F. 2d at 1146-1149, with opinion below (Pet. App.); *United States* v. *Salsbury*, *supra*, 430 F. 2d at 1048; and *United States* v. *Barrow*, 363 F. 2d 62, 65 (C.A. 3).[4] The cases arising in the Seventh Circuit have involved the incidental use of interstate facilities wholly unlike petitioners' regular check cashing operation. Given the wholly dissimilar

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[3] *United States* v. *Archer*, 486 F. 2d 670 (C.A. 2), does not present a conflict. That case "went no further than to hold that when the federal element in a prosecution under the Travel Act is furnished solely by undercover agents, a stricter standard is applicable" (486 F. 2d at 685-686; statement on denial of rehearing).

[4] The Seventh Circuit test is two-pronged: (1) the use of interstate facilities must be a conscious decision and not a matter of happenstance, and (2) the use of the interstate facilities must be a continuous one that is central, not incidental, to the illegal operation. The Fourth and Third Circuits have both stated that the use of interstate facilities need not be an integral part of the unlawful operation or essential to it, but only need facilitate the illegal activity.

nature of cases presented in the two circuits, it cannot be said how the Seventh Circuit would decide a case with facts like these.

2. The court below held that cashing out-of-state checks to settle accounts in a numbers operation constituted a violation of the Travel Act. In reaching this decision, the court stated that the standard to apply in reviewing Travel Act convictions is whether the conduct involved fits within the plain language of the statute, *i.e.*, is there a use of interstate facilities with intent to carry on or facilitate or promote any one of the illegal activities, coupled thereafter with a performance of or attempt to perform the illegal enterprise (Pet. App. 15a).

Petitioners contend that reviewing Travel Act convictions by reference to the plain language of the statute entails an unduly expansive reading of 18 U.S.C. 1952. Instead, they contend, the Travel Act should apply only where there is a substantial use of interstate facilities that are in addition, essential to the operation of the illegal activity. Otherwise, petitioners assert, the Travel Act would "* * * convert a substantial number of essentially state crimes into federal violations by the fortuitous and incidental use of interstate facilities and, as a result, would seriously upset the traditional federal-state balance" (Pet. 14). Petitioners cite this Court's decision in *Rewis* v. *United States*, 401 U.S. 808, in support of this assertion.

We agree with the court below (Pet. App. 10a) that there is no requirement of substantiality in the Travel Act and no reason to read one into it. As the court said (Pet. App. 10a):

> We reiterate that the facts bring this case squarely within the *plain language* of the Travel Act. The Congress chose to trigger application of the Travel Act by the use of "any facility in interstate or foreign

commerce." It did not provide that such use must be "substantial" nor, so far as we can ascertain, has it ever done so in any other federal criminal statute pegged to the use of interstate facilities.[5]

Similarly, like the court below (Pet. App. 10a-13a), we do not believe this case constitutes the type of improper expansion of the Travel Act condemned by this Court in *Rewis*. In *Rewis*, this Court considered Travel Act convictions based on the travel on interstate highways of customers from Georgia to the defendants' gambling establishment in Florida. There was no evidence in *Rewis* that the defendants encouraged out-of-state bettors to patronize their establishment. In reversing the convictions, this Court held that to allow Travel Act convictions based solely on interstate travel of bettors would create an expansive Travel Act that could alter sensitive Federal-State relationships, overextend limited federal police resources, and produce situations in which the geographic origin of a customer, a matter of happenstance, would transform relatively minor state offenses into federal felonies (401 U.S. at 812).

Here, the facts are significantly different. Petitioners, not their customers, used the interstate facilities. Additionally, cashing checks in petitioners' numbers business was not a matter of happenstance, but rather an essential feature of the illegal operation. Accordingly, *Rewis* lends no support to petitioners' argument and is clearly distinguishable.

Moreover, we fail to see how sustaining a Travel Act conviction based on the plain language of the statute constitutes an expansive reading of it. Rather, we believe

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[5]We believe there is no conflict with the decision in *United States* v. *Presley*, 478 F. 2d 163, 168 (C.A. 5). In *Presley*, the court merely stated that in determining whether as a matter of law a Travel Act violation is established, it may be necessary to submit the issue to the jury for fact-finding as to the use of the interstate facilities and their relation to the illegal activity.

that petitioners are urging a restrictive reading of the Act, at variance with its plain language and contrary to the clear intent of Congress.

3. At trial, petitioners requested an instruction that in order to be found guilty of conspiracy to violate the Travel Act, it must be found that each conspirator knew or should have known of the use of interstate facilities. This instruction was properly rejected by the trial court (Tr. 771-772). Instead, the court instructed the jury, in pertinent part, that to convict for conspiracy to violate the Travel Act they must find that one of the conspirators thereafter knowingly committed at least one of the overt acts charged in the indictment (all of which invovled cashing out-of-state checks) (Tr. 948-949).

This instruction was proper, allowing conviction of all parties to the illegal activity if one of them knowingly performed an overt act in furtherance of the conspiracy. *Pinkerton* v. *United States*, 328 U.S. 640, 646-647. There is no requirement that each conspirator have knowledge of every detail of the conspiracy, so long as they agreed to its essential plan. *Blumenthal* v. *United States*, 332 U.S. 539, 557; *United States* v. *Roselli*, 432 F. 2d 879, 891-892 (C.A. 9). Here, the evidence clearly supported a finding that petitioner LeFaivre, Sr. and others knowingly made use of interstate facilities in furtherance of the gambling conspiracy and that the conspiracy involved the other petitioners, LeFaivre, Jr., Miller, and Eckert.

However, as petitioner notes, this conclusion conflicts with the holding of the Court of Appeals for the Sixth Circuit in *United States* v. *Barnes*, 383 F. 2d 287, certiorari denied, 389 U.S. 1040, that each conspirator must be shown to have knowledge of the use of interstate facilities. This Court is presently considering, in *United States* v. *Feola*, No. 73-1123, argued November 19, 1974, whether proof of knowledge of a federal jurisdictional

element is ever required in federal conspiracy prosecution. Accordingly, the Court may wish to hold this case pending the decision in *Feola* and dispose of the petition in accord with that decision.

If this Court reverses the court of appeals in *Feola* and holds that knowledge of the federal jurisdictional element is not required, certiorari should be denied in this case, since the Sixth Circuit presumably would no longer follow its decision in *Barnes*. If, on the other hand, the Court affirms in *Feola*, it does not necessarily follow that the decision of the court below was wrong. *Feola* involves a conspiracy to assault federal undercover agents; none of the defendants were shown to have had knowledge of the officers' federal status. Here, by contrast, LeFaivre, Sr. and others made knowing use of interstate facilities in a conspiracy involving others. Thus, even if it is held in *Feola* that at least some of the conspirators must be shown to have had knowledge of the federal jurisdictional element, these convictions should stand. See *Pinkerton* v. *United States, supra,* and *Blumenthal* v. *United States, supra*. Under the circumstance of an affirmance by this Court in *Feola*, the proper disposition of this issue in the instant case will likely depend on the analysis of the issues in the *Feola* decision.

Respectfully submitted.

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